Supreme Court, U. S.
FILED
JUN 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1565

THE AETNA CASUALTY AND SURETY COMPANY, AETNA INSURANCE COMPANY, AMERICAN EMPIRE INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, COMPAGNIES D'ASSURANCES DU GROUPE CONCORDE, CONTINENTAL CASUALTY COMPANY, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, HARTFORD FIRE INSURANCE COMPANY, INDUSTRIAL INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, SECURITY INSURANCE COMPANY OF HARTFORD, THE TRAVELERS INDEMNITY COMPANIES, UNDERWRITERS AT LLOYDS AND ASSOCIATED BRITISH INSURANCE COMPANIES, UNITED STATES FIDELITY AND GUARANTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND ZURICH INSURANCE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

and

BERNARD C. GROSECLOSE, ALDEN E. HARE, WILLIAM L. HOGAN AND DENNIS L. HUNTER,

Defendants.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Preliminary Statement

Petitioners herein have decided to submit this reply brief because respondent United States of America, in its

brief in opposition, has taken positions entirely opposite to those urged by it in the Court of Appeals. It is apparent that the Solicitor General recognizes the erroneous reasoning of the Court of Appeals and now seeks to justify that Court's decision by changing the Government's arguments. The Solicitor General has implicitly recognized that the opinion below is not only wrong, but also contrary to the positions taken by a majority of the Courts of Appeal.

Argument

A. Right to Appeal.

In the Court of Appeals, the United States of America argued that it had standing to appeal because it was disqualified from providing legal representation to the individual defendants. The Court of Appeals accepted this argument and cited as authority for the Government's position *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600, 606 (D.C. Cir. 1976), which held that an attorney disqualified in grand jury proceedings has standing to take an appeal.

In Point I of their Petition (pp. 11-16), the petitioners argued the error of this position and demonstrated that all other Courts of Appeal have rejected the theory that a disqualified attorney in a civil case had an independent right to appeal.[1]

In its brief in opposition herein, the Solicitor General does not dispute petitioners' arguments on this point nor does he seek to justify the holding of the Court of Appeals that since "[t]he United States Attorney and the Department of Justice are the targets of the district court's order" the United States has a right to appeal (Appendix B, p.

[1] In addition to the circuits listed on pages 14 through 16 of the Petition, the Fifth Circuit has also held that an attorney has no standing to prosecute an appeal in a civil case. *Smith* v. *South Side Loan Co.*, 567 F.2d 306 (5th Cir. 1978).

A 22). Rather, the Solicitor General completely reverses his field and now argues that the Government had a right to appeal the district court's order not as a disqualified attorney (as argued and held below), but as a co-defendant that was aggrieved by the order disqualifying the United States Attorney and the Department of Justice from representing the individual defendants. The Solicitor General argues that the Government had a right to prosecute the appeal below because it has a general interest in defending public employees who are sued, since such suits might inhibit the employees in the performance of their official duties.

We note initially that this speculative argument should be addressed to a Congressional Committee considering a bill to grant all Government employees official immunity, rather than to a Court considering the ethics of attorneys. Nevertheless, while the Government, as an employer, might have a general interest in the subject matter, as a co-defendant tortfeasor being sued for the negligent activities of the Federal Aviation Administration, it has not been aggrieved within the legal meaning of standing to prosecute an appeal from an order disqualifying another party's attorney. *See* Petition, pp. 11-13.

In an effort to cloak themselves with a pecuniary interest in order to justify their appealing status, the Government now argues for the first time that if the Department of Justice cannot represent the individual defendants, the Government will pay for private counsel to defend the controllers pursuant to 28 C.F.R. §§ 50.15 and 50.16.

The Solicitor General is too late with this argument. After the district court disqualified Government counsel from representing the individual defendants, the Government did not hire private counsel for the individuals. The individuals were left in a default status, no appeal was filed in their names and no attorneys were hired for them. At the time of appeal, the Government had no financial interest because it refused to hire independent counsel for the in-

dividual defendants. For the Government to appear now as a gratuitous volunteer, when it realizes its mistakes, and announce in a brief that only if this Court reverses and vacates the opinion of the Court of Appeals will it pay for the individuals' defense counsel, is not only a failure to recognize its ethical obligation but is a classic case of too little-too late. Indeed, to argue that it has a financial interest in this matter only further exacerbates the Department of Justice's conflict of interest in light of Disciplinary Rule (DR) 5-101(A), as adopted by the North Carolina State Bar:

> "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

Perhaps to put this issue in proper perspective, it would be best to recall the simple fact that the individual defendants did not appeal from the order disqualifying the Department of Justice from representing them. It might well be that they were perfectly happy with that order and welcomed the opportunity to hire their own expert aviation attorneys at Government expense.

B. Union Representation.

The Department of Justice argued before the district court and the Court of Appeals that the attorney for the air traffic controllers' union advised the defendant controllers of the facts and the law and that this was evidence that there had been informed consent by the individual defendants.[2]

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[2] The Solicitor General now argues that petitioners did not challenge the Government lawyers' statements of informed consent. However, the record reveals that the Solicitor General's

(footnote continued on following page)

The Solicitor General now admits, via a footnote in his brief (No. 2), that two out of the four individual defendants were not members of the controllers' union, but argues that this was not a material point and did not mislead the Court of Appeals. Petitioners find this argument incredible in light of the Court of Appeals' holding:

> "[C]ounsel for the air controllers' union participated in the discussions between the individual defendants and the Department of Justice, and we think it reasonable to assume that he was aware of any problems and properly advised the controllers with respect to their best interests." (Appendix B, p. A 25).

To first mislead the lower courts as to union representation, and then say it did not mean anything, is completely unacceptable behavior by Government counsel. Are we to also assume that the union attorney was protecting the interests of two non-union members, one of whom was Chief of the Charlotte Tower and a representative of FAA management? Clearly, there was no proof of informed consent, and the only evidence available at this time supports the district court's conclusion that "the consent of an individual litigant cannot be presumed to be fully informed when it is procured without the advice of a lawyer who has no conflict of interest." (Appendix B, p. A 14; Petition, p. 21, n. 13).

C. Judgment Against Individual Defendants.

The final reversal of position by the Solicitor General herein pertains to the entry of judgment against the individual defendants. In its brief in the Court of Appeals, the Government argued that there was no conflict of interest

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(footnote continued from preceding page)

argument is completely wrong since petitioners' attorney wrote to the district court pointing out the erroneous legal advice being given to the controllers and that in light thereof, informed consent could not exist (A. 115).

between the Government and the individual controllers because a judgment against the Government would bar the entry of a judgment against the controllers. Government Brief, p. 29. The Court of Appeals accepted this argument (Appendix B, pp. A 24-25), and considered it one of the practical reasons for concluding that Justice Department lawyers could also represent the individual defendants.

Now the Solicitor General admits, again via a footnote in his brief (No. 3), that there could be a judgment only against the individual defendants. This change of position completely destroys one of the main reasons for the Court of Appeals' decision.

Under the Ethical Considerations of the Federal Bar Association (Appendix A, pp. A 3-4), a Government lawyer owes his first loyalty to the agency he is defending. If the Government employee reveals that he failed to follow agency rules and procedures, the Government lawyer must report such infractions to the agency. F.E.C. 4-1 and 4-2 (Appendix A, pp. A 3-4).

With these ethical considerations always present, how can a Government lawyer defend individuals who may be subject to a multi-million dollar judgment, when that same lawyer owes his first loyalty to the agency involved?

The change of position by the Government herein makes it obvious that there is such a gross conflict of interest that summary reversal may well be in order.

CONCLUSION

The petition for a Writ of Certiorari should be granted, the decision below vacated, and the case remanded for further proceedings in accordance with the district court's opinion.

Respectfully submitted,

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